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Raz on Detachment and Describability

> His world is a noonday world in which sharply outlined figures, most of them more than a little singular, act in describable ways against perceptible backgrounds.
>
> Clifford Geertz, speaking of
> Sir Edward Evan Evans-Pritchard

1.

In the preface to The Concept of Law, H.L.A. Hart depicts his book as "an essay in descriptive sociology" (1961/94: vi). His aim was to study legal goings-on from the external point of view, and to characterize them in a purely descriptive vocabulary. Among legal goings-on are normative practices, including the normative discursive practices of law. But Hart did not see the fact that the objects of his study are normative practices as posing any problem for a descriptive study. As he says in the posthumously published postscript to The Concept of Law, "[d]escription may still be a description, even when what is described is an evaluation" (1994: 244).

For some time now, under the rather bland heading of "methodology", this assumption in what may be called the "describability" of normative practices has been a subject of an intermittently intense debate in legal philosophy. This debate has proceeded largely in isolation from discussions of the contiguous and parallel issues in other areas of philosophy including philosophy of language and philosophy of mind -- e.g. describability of intentional aspects of human agency. And it is my impression that in these other areas of philosophy various arguments against describability are considered tantalizing but also obscure and

inconclusive, whereas the most influential of legal philosophers have come to reject the describability of legal practices (or normative practices in general). And at least a vague consensus in legal philosophy seems to be that Hart's assumption of describability resulted from a philosophical naiveté that has been discredited by strong and steady currents of post-Enlightenment philosophy.[1]

This paper's purpose is to examine and evaluate the considerations that one influential legal philosopher, Joseph Raz, has relied on to reject the describability of legal practices. But the scope of the paper is actually both narrower and broader than what that last statement indicates. First, instead of examining the describability of legal practices in general, I would like to concentrate on the describability of discursive aspects of legal practices in particular. Second, in addition to Raz's direct arguments against the describability of legal practices, I would like to take up another line of argument that Raz uses in tandem with his arguments against describability to question the adequacy of Hart's characterization of legal discourse. In the end, I will conclude that Raz's arguments are inadequate for their purpose, and that if the describability of the discursive aspects of law is to be questioned then its foes must seek out another set of arguments.

A couple of preliminary words before I go on. First, I should point out that although I have tried to ascertain Raz's views as faithfully and as sympathetically as I can, I am far from confident that I have them right. I find some of Raz's writings very difficult and elusive. And for this reason, at a number of junctures in the following pages, I will be confessing reservations about my interpretations of some key passages from Raz's writings, and at times trying out multiple interpretations of single passages.

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[1] Such a presumption against describability seems to be quite common in the present-day humanities in general, including anthropology, as indicated by Clifford Geertz's rather bemused characterization of an aspect of E.E. Evans-Pritchard's writings that I have quoted at the beginning of this paper (1988: 68).

Second, my thoughts about describability that I will be outlining in this paper are very much tentative and exploratory. Many philosophers have argued against describability, and I am intrigued by their claims. But I have yet to find an author who formulates the considerations against it in ways that I can clearly discern and grapple with. In the near future, I hope to deal more systematically with the issue of describability. In the meantime, this paper consists of my preliminary reactions to one philosopher's arguments against describability, or the most convincing arguments I have been able to muster on his behalf.

2.

Hart famously drew a distinction between internal and external legal statements (1961/94: vi, 89, 102-103). Internal legal statements are assertions of law. They are normative statements made from the point of view of an adherent of a legal system (e.g. a judge or a lawyer). External legal statements, on the other hand, are statements about individual laws or legal systems. They are descriptive statements made from the point of view of an observer (e.g. a sociologist or an anthropologist).

Given that the practice of law is a discursive practice, one large and important aspect of understanding legal goings-on is to obtain an understanding of what lawyers and others are up to in uttering internal legal statements. Instead of offering straight analysis of internal legal statements, Hart provided an analysis of theoretical statements that attribute internal legal statements to speakers. With some rational reconstruction, what could be called Hart's oblique analysis[2] of internal legal statements can be characterized as follows: In uttering an internal legal statement, a speaker expresses his acceptance of norms that make up the legal system. What Hart offers then is an expressivist or noncognitivist analysis of internal legal statements.

[2] Allan Gibbard distinguishes between "stright" and "oblique" analyses in his (2003: 185). But the idea behind the distinction is of an older vintage and can be found in the thought that one way of giving an analysis of a word is to describe its typical uses. See Waismann (1956: 6); Gibbard (1990: 30-31).

Raz has been one of a few[3] who have seen that Hart offers an expressivist analysis of internal legal statements. In a 1981 article comparing Hart and Hans Kelsen's positions, Raz outlines Hart's conception of internal legal statements as follows:

> In part the meaning of legal statements can be given a truth-conditional analysis. Legal statements are true if and only if certain relations obtain between them and the complex social practices. But it would be wrong to say that legal statements are just statements about the existence of those practices. The truth-conditional analysis does not exhaust the meaning of legal statements. To understand them one must also understand their standard uses and what they express. Their typical use is to provide guidance by criticizing, commending, demanding, advising, approving, etc. and they express acceptance by the speaker of standards of behaviour towards conformity with which the statement is used to guide its addressee. (1981: 448)

Similarly, in a 1993 memorial essay on Hart, Raz summarizes Hart's account of deontic statements, of which legal statements are one species, as follows:

> If Hart must be classified as one or the other, then it is better to classify him with the non-cognitivists. But he charted his own way between the two, and developed a distinctive view which combines cognitivist and non-cognitivist elements. Statements of rules, duties, and rights are true or false, but the conditions which render them true or false do not exhaust their meaning and do not account for their normative character. The truth-conditions of such statements are the existence of certain social practices . . . . A simple moral statement such as 'parents have a duty to look after their children' is true if there is (in the community to which the speaker belongs) a practice that parents have such a duty, that is, roughly speaking, if most parents do so and are consciously disposed to do so. But the statement means more than that. It also expresses its speaker's endorsement of this rule, his willingness to be guided, and to require others to be guided, by it. This second non-cognitivist component expresses the normative element in the statement. (1993: 148)

Thus Raz attributes to Hart an analysis that has an expressivist or noncogntivist prong and a descriptivist or cognitivist prong.

Raz's conception of Hart's analysis of internal legal statements can be summarized as follows:

> (A1) A speaker makes an internal legal statement iff he:
> (i) expresses his acceptance of some norm; and
> (ii) states that the same norm is generally accepted and complied with by the members of his community.

[3] The only other people that I am aware of are John Devlin and Michael Smith. Devlin was the first to urge me to read Hart as an expressivist.

In a recent paper (2005), I appealed to various textual and historical evidence to delineate a more precise analysis of internal legal statements that Hart seems committed to. But for the purposes of this paper, Raz's conception of Hart's analysis is on the whole sufficiently close to what I think is Hart's. I will make only one small though significant alteration to (A1) to facilitate my subsequent discussion. What I propose is the following:

> (A2) A speaker makes an internal legal statement iff he:
> (i) expresses his acceptance of some norm; and
> (ii) presupposes that the same norm is generally accepted and complied with by the members of his community.[4]

For the balance of this paper, I will assume that (A2) is the analysis of internal legal statements that Hart favored.

3.

In Raz's writings, there are two lines of reasoning that cast doubt on the adequacy of (A2), and even the viability of the approach that Hart has taken in analyzing internal legal statements. The two lines of reasoning, both adopted from Kelsen, call into question two aspects of the proposed analysis that Hart took for granted.

First, in attempting to provide an analysis of internal legal statements, Hart concentrated on the statements of those who generally accept and use laws as guides to their own conduct and as standards of criticism. In a number of places, Raz has pointed out that occupation of such a committed point of view -- what Hart calls the "internal point of view" -- is not necessary for a speaker to utter internal legal statements. For instance, even disaffected or alienated members of a community, ones whose normative commitments are deeply at odds with those embedded in the community's legal system, may utter internal legal statements. The worry

[4] Considerations for this alteration (as well as some others) are provided in my (2005: § 4). In formulating (A2) above, I am relying on Robert Stalnaker's pragmatic conception of presupposition. According to that conception, a speaker presupposes a proposition when he takes its truth for granted, and assumes that others involved in the conversation do the same. See e.g. Stalnaker (1974: 49).

then is that (A2) fails to capture a significant portion of the internal legal discourse.

The second assumption by Hart that Raz questions is describability. Not only in The Concept of Law, but also in his subsequent writings, Hart has assumed that legal practices in particular, and human social practices in general, are describable in nonnormative terms. (A2) displays Hart's commitment to describability. Although it is an analysis of normative statements, the terms in which it is formulated are "flatly descriptive and normatively neutral" ones (cf. Hart 1973: 28). Raz has argued that one cannot stick to the observer's point of view in characterizing normative human practices, and still adequately account for their normative nature. He has argued that one must assume, in some sense, the internal or participant's point of view, and deploy normative statements if one wants to characterize satisfactorily the workings of a normative practice like that of law. Raz has thus challenged describability, to which (A2) is implicitly committed.

In subsequent sections, I will take up in turn Raz's two lines of reasoning, and ultimately find them wanting.

4.

Raz has taken notice of the existence of a type of internal legal statements that he calls "detached legal statements". And this has led him to deny that internal legal statements can be made only by those who generally accepts and uses the relevant laws as guides to their own conduct and as standards of criticism.

Raz has argued that Hart's division of legal statements simply into internal and external sorts obscures from view a very significant class of internal legal statements (1975/90: 172-173; 1977: 155; 1980: 235-236; cf. Baker 1977: 41-42). The internal legal statements Hart had in mind are those that display the speaker's acceptance of or commitment to the norms of the legal system within which he speaks. In addition to such committed internal legal statements, as Raz calls them, there are, Raz observes, detached internal legal statements, or statements from the "legal point of

view", or statements from the point of view of the "legal man", as Raz has also called them.[5]

The examples Raz gives of detached legal statements seem to fall into two main categories: (i) statements of law made within the speaker's own legal system; and (ii) statements of law made within a legal system that is not the speaker's own. In the first category belong statements of law made by lawyers and judges who do not accept or endorse the norms of their legal system (Raz 1975/90: 172, 176-177; 1976: 499, 500; 1977: 153, 155-156; 1980: 236). Statements of law teachers and legal writers can belong to either category. Teachers and expositors of domestic laws make statements that belong to the first category (Raz 1974: 140; 1975/90: 176; 1976: 499, 500; 1977: 153, 155-156; 1980: 236). On the other hand, the statements of teachers and expositors of laws of foreign legal systems, historical legal systems that are no longer extant, or hypothetical ones (e.g. a proposed model code) are prime examples of statements in the second category (Raz 1975/90: 170-171).

To give an example, a lawyer who is a libertarian at heart and hence does not believe that governments should tax its citizens may advise a client by uttering: "You are obligated to pay your taxes by April 15." This would be a detached legal statement of the first type. And a present day teacher of the Roman law may tell his students: "If your servant throws something out from your attic and thereby hits and injures a passerby, then you have committed a delict." This would be an example of

[5] Interestingly, Hart discusses the phenomenon of detached legal statements, though he does not use that term, in a couple of places that predate Raz's more sustained discussion. Raz's detached legal statements are supposed to be equivalent to Kelsen's Rechtssätze. In a 1968 article on Kelsen, Hart says that the Rechtssätze are marked by a certain "essential relativity to a given [legal] system", and adds that uses of such statements are characteristic of "a certain kind of discourse frequent among lawyers" (1968: 329). In a slightly earlier article, Hart says that the existence and prevalence of detached legal statements (though again he does not use this particular term) indicates that the view that internal legal statements are a species of internal moral statements is mistaken (1966/82: 146). But here, Hart does not seem bothered by the fact that the analysis of internal legal statements that he proposes in The Concept of Law (1961/94) -- which is very similar to (A2) -- does not account for these detached statements.

detached legal statements of the second type. The feature common to all detached legal statements is that the speaker does not, in making such statements, display his acceptances of or commitments to the norms of the legal system within which he speaks. In this respect, detached legal statements are distinct from adherent legal statements, or committed internal legal statements as Raz calls them.

At the same time, according to Raz, detached legal statements are not external legal statements. This seems to me a much more difficult distinction to maintain than the previous one. If detached legal statements do not display the speaker's acceptance of or commitment to the relevant legal norms, in what sense are they internal? In what sense are they assertions of law, rather than statements about laws or a legal system?[6]

5.

I am not entirely sure that I understand the relevant argument in Practical Reason and Norms (1975/90), where as far as I am aware Raz first introduces detached legal statements. My impression is that Raz merely states there that detached legal statements are not equivalent to descriptions of people's beliefs and attitudes (1975/90: 175; cf. 1977: 153; 1981: 455). Without further argument, this is question-begging. Take the above-discussed libertarian lawyer's tax advice. That statement is clearly of the type that Raz classifies as a detached legal statement. But it seems that those who are happy with Hart's taxonomy would maintain that the lawyer's advice is nothing other than a description of a community's adherence to the relevant tax laws. And the fact of that adherence amounts to the members of that community accepting and complying with the relevant tax laws. In sum, those happy with Hart's taxonomy would maintain that the

[6] As I said in footnote __, Raz's detached legal statements are supposed to be equivalent to Kelsen's Rechtssätze. It may be worth pointing out here that at least one influential Kelsen commentator has argued that Kelsen's Rechtssätze are equivalent to Hart's external legal statements. See Bulygin (1981: 433).

libertarian lawyer's advice is an instance of what Hart calls external legal statements.

Raz provides a further argument for his position that detached legal statements are distinct from external legal statements in the 1980 postscript to The Concept of a Legal System (1970/80). He says there:

> A person describing legal institutions by the use of normative terms normally implies his acceptance of the bindingness of the rules on which his statement rests. This can be called the committed use of normative language. Not all statements made by the use of normative language are of this kind. It has been often remarked that normative language can be used to describe other people's normative views as in 'During the last decade it has become common among professional people to believe that a woman has a right to abortion on demand'. Many authors assume that all non-committed use of normative language is of this kind. But consider a solicitor advising a client or a writer discussing a point of law. Typically they will not be asserting what other people believe the law to be, rather they will be stating what it is. Since the law is normally a matter of public knowledge it may well be that others believe it to be as the solicitor or writer states. But this is incidental to their purpose and in typical cases is not what they state. It may well be that the point of law clarified by them, though correct, never occurred to anyone before. The solicitor may, for practical reasons, be worried by this. The author on the other hand is likely to regard such novelty as a feather in his cap. In any case neither the content nor the truth of their statement is affected by whether or not it is a novel point of law. (1980: 235-236)

It is not entirely clear what Raz's point here is. An example of a particular kind of detached legal statements that Raz seems to have in mind would be useful in exploring ways to ascertain Raz's point. A lawyer may advise a client: "A marriage between a homosexual couple is enforceable." Let us assume that the lawyer considers this a pernicious law. If he were in the position of a legislator, he would try to change this law. It follows that this legal advice is not a committed internal legal statement. The question then is whether it is an external legal statement.

Let us further assume that the same advice is a novel legal conclusion. Neither the legislature nor any courts of the relevant jurisdiction had promulgated the said law, and there is no consensus in the bar that this is the correct law. But the lawyer may, based on his legal research and reasoning, conclude that what the statement says is the case. Now, according to Hart, an external legal statement describes a

configuration of community members' mental attitudes towards the relevant laws.[7] By assumption then, there is no requisite configuration of community members' mental attitudes that would make the above legal advice, construed as an external legal statement, true; and the lawyer is well aware of that fact when he utters his advice. Raz would have us conclude that the marriage law advice is not an external legal statement.

The case may not be so simple, however. Hart did not espouse the view that the existence of each law consists of a distinct configuration of mental attitudes in favor of that law. Rather, according to him, the existence of the rule of recognition of a legal system consists of a configuration of norm-acceptances on the part of the officials of the relevant legal jurisdiction. And the existence of any subordinate law consists of that law's being valid according to the rule of recognition -- in other words, meeting the criteria enumerated by the rule of recognition. According to Hart then, laws can exist in the absence of distinct configurations of mental attitudes that support them individually.

It follows that external legal statements, as Hart conceives them, do not have to be of the kind that summarize distinct configurations of mental attitudes that support individual norms. They can also be of the kind that summarize the fact that among the mental attitudes that constitute the existence of the rule of recognition are the mental attitudes that involve dispositions to treat a particular norm as a valid law of the legal system in question. It follows in turn that the fact that a speaker may sincerely utter an uncommitted legal statement, with a full awareness of the absence of a distinct configuration of mental attitudes for the relevant particular law, does not alone show that the same statement is not an external legal statement.

6.

[7] The mental attitudes that Raz speaks of in the above passage are beliefs, but it would be more accurate to speak of norm-acceptances instead.

Yet, perhaps the above-quoted passage from the postscript to The Concept of a Legal System touches on a consideration that provides a basis for a more plausible argument for distinguishing detached statements from external statements. Lawyers who are not committed to the laws of their legal system are able to reason their way from these laws to novel legal conclusions. We may wonder what psychological processes and mechanisms lawyers rely on to do this.

One possibility is that lawyers have knowledge, explicit or tacit, of what psychological cum sociological facts need to obtain for there to exist a law in a community.[8] Lawyers who are not committed to the laws of their legal system then can be interpreted as deploying this knowledge to arrive at novel legal conclusions. From the existing configurations of mental attitudes among the members of their community, the lawyers can determine what laws are firmly established among them. They can then deploy their knowledge of psychological and sociological generalizations to draw novel legal conclusions.

An alternative possibility is that lawyers who do not accept the laws of their legal system are not deploying their knowledge of existence conditions for laws, but instead are imaginatively identifying with someone who does accept the laws of their legal system, and using normative reasoning from such a person's shoes to reach novel legal conclusions. In other words, lawyers who are not committed to the laws of their legal system can be interpreted as simulating the normative reasoning of a person who is committed to the relevant laws.

It may be thought that this second possibility is the more plausible of the two explanations given that most lawyers, and even most legal scholars, lack the psychological and sociological knowledge of the sort required by the first explanation. After all, most lawyers are not

[8] The two possibilities that I am outlining in this paragraph and the next are intended to approximate the theory theory and mental simulation approaches, respectively, to explaining mental state attributions. In outlining them, I have benefited from the articles on folk psychology and mental simulation collected in Davies & Stone (1995), and especially the introduction to this collection by the editors (1995a).

jurisprudents. Yet, their abilities to engage in legal reasoning and offer legal advice are hampered neither by their possible rejection of the norms of their legal system, nor by their probable ignorance of Hart's or anyone else's account of what psychological and sociological facts underlie existence of laws.[9]

I do not believe that this last point is a decisive consideration against the first explanation of lawyers' ability. For as I indicated from the start, the knowledge required by the first explanation may be a tacit one, and lawyers may actually possess such tacit knowledge. Certainly, much philosophical and psychological investigation needs to be done before we can confidently opine as to which of the two explanations is better supported. And there may well be a better third explanation that we are overlooking. But the second explanation based on simulation is certainly plausible, and something like it is what Raz may be gesturing at in the long passage from the postscript to The Concept of a Legal System that I have quoted above. It may be worthwhile investigating what the consequences of accepting it are for the semantics of detached legal statements, and for the viability of the analysis of internal legal statements of the sort that I have attributed to Hart.

The simulation explanation of what disaffected lawyers are up to in reasoning their way to novel legal conclusions does not entail any specific semantic account of detached legal statements (cf. Goldman 1986: 94). But it certainly enhances the plausibility of Raz's claim that detached legal statements are not external legal statements. It encourages us to think that detached legal statements -- e.g. the marriage law advice which served as our example in the last section -- are products of a form of normative

[9] In writing this paragraph, I have benefitted from Alvin Goldman's argument against folk-theory theories. One of the considerations that Goldman relies on is the conjunction of young children's ability to interpret others, and the implausibility of attributing to young children the knowledge of the laws of folk psychology. See Goldman (1986: 80). Something like Goldman's reasoning is needed to defend the oft-stated view that what Bernard Williams calls "thick ethical concepts" can be used accurately only by those who appreciate (though not necessarily endorse) the evaluative views that the concepts assume. See Williams (1986: 141-142).

reasoning, and that they are internal legal statements, albeit simulated or pretended internal legal statements.

Raz has remarked that detached internal statements are very common, not only in law but in all normative discourses (1975/90: 177).[10] But there is a reason to think that they are especially common in law. Because of the procedural nature of law, there are bound to be many instances when one accepts the ultimate norms of one's legal system or the system as a whole, but does not consider some particular outcomes of valid procedural operations from those ultimate norms as furnishing valid reasons for action.[11] This means that many members of a community, perhaps all, are disaffected to some extent. It also means that detached statements are very common, perhaps ubiquitous, in the workings of any legal system.

Assumption of the adherent's point of view is not necessary in making detached legal statements. It follows that the analysis of internal legal statements in terms of acceptance of norms -- where acceptance is taken to consist in standing dispositions of the speaker to take patterns of conduct as both guides to his own conduct and as standards of criticism (Hart 1961/94: 57, 140; 1994: 255), or similarly as a set of dispositions to be governed by a norm, and to avow it in unconstrained normative discussion, as a result of the workings of mutual demands for consistency in the positions one takes in normative discussion (Gibbard 1990: 74, 75) -- fails to account for a very significant portion of the internal legal discourse. What the existence of detached legal statements indicates is that what is common to internal legal statements is something far less strict or demanding than the acceptance of norms that Hart's analysis demands. We may also wonder whether even those who take the adherent point of view really express their acceptances of legal norms when they make internal

[10] Gilbert Harman, for one, has noticed their uses in the moral discourse (1975: 9-10).

[11] Thanks to David Hills for drawing my attention to the relevance of the procedural nature of law to the issues at hand. See also Gibbard (1990: 246-248).

legal statements. Even they may be expressing a lesser or no commitment to the law.

7.

Having thus specified one possible and (I submit) plausible reading of Raz's reasons for thinking that detached legal statements constitute a distinct set of internal legal statements, we must determine whether Hart indeed lacked resources to account for such statements, as Raz has argued. Before doing so, however, and as a way of leading up to that determination, it would be useful to summarize Hart's explicit reactions, in his late years, to Raz's discussion of the phenomenon of detached legal statements.

Hart explicitly accepted the criticism that his taxonomy of legal statements misses out on detached legal statements (1983a: 13-14). And he accepted Raz's distinction between committed and detached internal legal statements as a "valuable supplementation" to his own between internal and external legal statements (1966/82: 154-155). But Hart and Raz drew interestingly different conclusions from the possibility of internal legal statements that do not involve acceptances of norms.

In seeing their differences, it is necessary to be acquainted with Raz's distinction between full acceptance and weak acceptance. One who fully accepts a norm considers the norm binding on all its subjects, whereas one who only weakly accepts a norm considers the norm binding only on himself (Raz 1977: 155 n.13; see also 1981: 454-455; 1984b: 130). According to Raz, full acceptance amounts to moral endorsement (1981: 454-455; 1984b: 130-131). As a matter of fact, he uses the terms "acceptance" and "endorsement" interchangeably. It is this last assumption, which Hart eventually came to share (1982a: 266-267), for reasons I do not quite understand, that seems to motivate Hart and Raz's divergent reactions to the phenomenon of detached legal statements.[12]

[12] In depicting Hart and Raz's divergent reactions in the following paragraphs, I have intentionally avoided using the terms "cognitive" and "noncognitive" that they use to characterize Raz's and Hart's conceptions of reasons, respectively. See e.g. Raz (1981: 448-449); Hart (1966/82: 157, 159-160; 1982a: 266-267). I have done so because their uses of those terms are not entirely consistent with the uses of the same terms in the

Raz is convinced that what is expressed in utterances of internal legal statements is full acceptance, although he does not argue for this position. In order to account for the existence and prevalence of detached statements in the legal discourse, he claims that what is involved in an utterance of an internal legal statements is sincere or pretended full acceptance of legal norms (see 1981: 453, 457). Given the already-mentioned assumption of Raz's that full acceptance is moral endorsement, this amounts to the position that internal legal statements are sincere or pretended internal moral statements. It is this last position that Hart was most concerned to avoid. Here, he was motivated by his legal positivist preoccupation with denying any significant noncontingent connection between law and morality.

In the last pages of the last substantive and substantial article published in his lifetime, Hart takes note of Raz's distinction between full and weak acceptances, and wonders whether weak acceptance is all that is necessary in judges' utterances of internal legal statements (1982a: 265). Eventually, albeit tentatively, Hart conjectures that what is involved in utterances of internal legal statements may be a pared down version of weak acceptance. He says:

> [J]udges, in speaking of the subject's legal duty, may mean to speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is 'owed' by the subject, that is, may legally be demanded or extracted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statements of the subject's legal duty. (266; cf. 1966/82: 159-160)

Hart goes on to remark that "judicial statements of the subject's legal duties need have nothing to do with the subject's reasons for action"

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recent metaethical literature, and for this reason may easily lead to confusions. I have used other terms to convey what I think they are getting at. My suspicion is that both Hart and Raz are deeply confused about what cognitivism and noncognitivism about reasons or duties involve, and that their confusions at least partly drive their respective reactions to the phenomenon of detached statements, and their debate. I have not been able to explore these issues sufficiently to have something more tangible than a suspicion.

(1982a: 267). He may well have added: "Nor with the judge's own reasons for action in his off-duty hours." Hart concludes that what is involved in utterances of internal legal statements may be such "institutionalized 'whittled down' form of acceptance" (268).

Hart was willing to pare down his conception of norm-acceptance to the extent summarized here, and thus abandon the general strategy he employed in The Concept of Law to analyze internal legal statements, in order to be able to deny the claim that internal legal statements are a species of internal moral statements. Hart was mistaken to do so, I believe. First, Raz's claim that full acceptances necessarily amount to moral endorsements is unwarranted. Second, Raz is right in thinking that full acceptances are expressed in making internal legal statements. I shall argue for these two points in turn in the following two sections.

8.

It is Raz's position that any full acceptance of a norm amounts to a moral endorsement of that norm. He articulates and defends this claim in the following key passage from his "The Purity of the Pure Theory" (1981):

> The crucial point is that much legal discourse concerns the rights and duties of others. While one can accept the law as a guide for one's own behaviour for reasons of one's own personal preferences or of self-interest one cannot adduce one's preferences or one's self interest by themselves as a justification for holding that other people must, or have a duty to act in a certain way. To claim that another has to act in my interest is normally to make a moral claim about his moral obligations.
>
> There are to be sure reasons on which claims about other people's duties and rights can be based which are neither moral reasons nor the speaker's self interest or preferences. But none of them nor any combination of them is likely to explain the widespread use of normative language in legal discourse. I find it impossible to resist the conclusion that most internal or committed legal statements, at any rate those about the rights and duties of others, are moral claims. (454-455)

I cannot help but think that Raz's claim here that a full acceptance of a norm is a moral endorsement of that norm is motivated by some confusions.

For one, Raz seems to assume that the acceptance involved in making a legal judgment must be based on some other normative judgment, that a person cannot consider a law as furnishing a reason for action unless its

demand coincides with a demand of some other, more fundamental, set of norms. But why think this? Let us say that an anthropologist comes across a community of people who apparently accept some set of norms -- in the sense that they are disposed to guide their own behavior by these norms, to avow them in conversations, and to use them as standards of criticisms. And let us further say that these norms constitute a system possessing whatever features that distinguish legal systems from other normative systems. Should not the anthropologist then conclude that this community has a legal system, and that in verbally expressing their acceptances of the said norms the members of the community are uttering internal legal statements? It seems that the anthropologist can, and in fact should, remain neutral about whether or not the community members treat laws as reasons because these reasons coincide with some other normative considerations. Hart offers such a neutral theory.

Even if we concede that legal reasons have to be based on some other kinds of reasons, Raz seems to have an unreasonably impoverished view of what kinds of reasons they can be based on. As the above quote indicates, Raz takes the reasons of personal preference or self-interest and the reasons of morality as the only real candidates. Raz subscribes to what seems to me a reasonable assumption that internal legal statements purport to give objective or categorical reasons. And this assumption motivates him to conclude, correctly I believe, that full acceptances are expressed in utterances of internal legal statements, and also that such acceptances cannot be based on considerations of personal preference or self-interest alone. But he is wrong to think that this means that legal judgments are norm-acceptances that amount to moral endorsements, and hence that internal legal statements are a species of internal moral statements. For there are, aside from moral statements, other normative statements that carry the purport of giving objective or categorical reasons. Aesthetic statements

and etiquette statements come to mind. Statements of prudence can be added to the list.[13]

In sum, Raz has not furnished us with a good reason for his position that the full acceptances of norms that are expressed by speakers of internal legal statements amount to moral endorsements. Nor have I been able to come up with one on Raz's behalf.

9.

Let me now turn to the second of the two tasks I distinguished at the end of § 7. Like Raz, I find the claim that only weak acceptance of norms is expressed in utterances of internal legal statements implausible. But I will not rely on this intuition alone. I shall instead argue that Hart's original strategy of analyzing internal legal statements as expressions of full acceptance of norms can be vindicated.

Of course, the phenomenon of detached legal statements to which Raz has rightly drawn our attention must be accounted for. I believe that detached legal statements can be analyzed as having a meaning that is parasitic on the meaning of committed internal legal statements. What can be shown is the primacy of the meaning of committed internal legal statements, and that should be sufficient to vindicate Hart's original strategy.[14]

In Practical Reason and Norms, Raz argues that detached internal statements are reducible neither to committed internal statements nor to

[13] Raz may respond by pointing out that such statements are not normally formulated in deontic predicates, whereas legal statements are. Several sentences in the above-quoted passage from "The Purity of the Pure Theory", especially the last sentence, indicate that Raz saw a special need to explain the use of deontic predicates in the legal discourse. See also Raz (1975/80: 154-156, 163, 169-170; 1979: vii; 1980: 230, 234-235; 1984b: 129-131); Hart (1966/82). His point may be that all deontically-formulated objective- or categorical-reason-giving statements are moral statements. This counter-response I am attributing to Raz, however, runs up against Hart's very plausible theses that the original and natural home of deontic concepts like "obligation" and "right" is law, not morality, and that the wholesale deployment of such concepts in internal moral discussions may be inappropriate and even blinding. See Hart (1958b).

[14] In fact, Raz has also said that committed internal statements are "primary" legal statements, and that detached internal statements are "parasitic" on the committed statements (1984a: 254). Raz, however, does not indicate how exactly the parasitic relation holds, as I try to do below.

external statements (1975/90: 172-175). This failure of reduction, he insists, shows that Hart's taxonomy of legal statements leads to a gross distortion (172). This insistence is odd. For Hart would not have sought to reduce detached internal statements in trying to explain them. This can be learned from his explanation of committed internal legal statements. As Raz himself as observed (1981: 447-448; 1993b: 147; see also Baker 1977), Hart rejected any attempt to reduce committed internal legal statements to external legal statements. Instead of offering a reductive or straight analysis, in resorting to expressivism, Hart offered what may be called an oblique analysis of committed internal legal statements.[15] This suggests that what Hart would have sought in trying to account for detached internal statements is another oblique analysis.

That is what I propose. Detached internal legal statements can be given the following expressivist analysis:

> (A3) A speaker makes a detached internal legal statement iff he:
> (i) expresses a psychological state that simulates an acceptance of some norm; and
> (ii) presupposes that the same norm is generally accepted and complied with by the members of his community.[16]

This analysis is clearly parasitic on (A2), the analysis of internal legal statements that I attributed to Hart in § 2 above. It indicates that the meaning of detached internal legal statements is parasitic on the meaning of committed internal legal statements. (A3) also vindicates Raz's claim that what is involved in utterances of detached legal statements are pretended full acceptances of norms; simulation is what is involved in pretense. At the same time, it meets Raz's demand (1974: 145) for a

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[15] I briefly discussed the difference between straight and oblique analyses in note __ above.

[16] It may be thought that (A3)(ii), as currently formulated, is inaccurate because a speaker of a detached legal statement need not sincerely presuppose the relevant descriptive content. But nothing in Stalnaker's conception of presupposition requires the commitment involved in presupposing a proposition to be a sincere one. Stalnaker has suggested that participants in a conversation need not literally take the truth of the presupposed proposition for granted. Instead, participants may accept a known falsehood or a doubtful proposition for the purpose of furthering conversation (1973: 449). In other words, participants in a conversation may assume and abandon presuppositions at will. And that seems to accurately depict what speakers of detached legal statements are up to.

semantics of detached legal statements.

I take myself to have shown that, contrary to what Hart seems to have believed in his late years, there is no need to abandon the type of analyses that he advocated in The Concept of Law. The first of the two lines of reasoning that I outlined and attributed to Raz at the beginning of this paper -- the line of reasoning to the effect that occupation of the adherent's point of view is not necessary for utterances of internal legal statements -- does not pose any problem for the viability of the type of analysis of internal legal statements that Hart advocates. The phenomenon of detached legal statements is a very interesting one that Raz has helpfully drawn our attention to. But the analysis of internal legal statements that Hart has devised can be very naturally extended to account for detached legal statements.

10.

Let me now turn to Raz's second line of argument -- the direct argument against describability. Raz gives Kelsen the credit for having first noticed detached legal statements (Raz 1975/90: 211 n.3; 1977: 155). Raz's argument against describability is even more closely allied with Kelsen's agenda. In fact, it is exceedingly difficult to separate out Raz's argument against describability from his exposition of what he takes to be Kelsenian doctrines.[17]

Kelsen's argument against describability, as Raz expounds it, is embedded in his attempt to explain the normativity of law. According to Raz, the problem of the normativity of law has to do with explaining how it is that laws are reasons for action (1975/90: 154-155, 163).[18] Raz's

[17] I have not sought in the following pages to go beyond Raz's characterizations of Kelsen's views. My acquaintance with Kelsen's vast corpus is rather limited, and at least so far has been filtered largely through Raz's interpretations. And some Kelsen scholars have disputed Raz's interpretations of Kelsen's views. See Bulygin (1981); Vernengo (1986). For these reasons, what I refer to in the following paragraphs as Kelsen's views should be taken as a shorthand for Kelsen's views as Raz construes them.

[18] In many places, Raz also says that the problem of the normativity of law has to do with explaining why normative language is used in the legal discourse (e.g. 1975/90: 154-156, 163, 169-170; 1979: vii; 1980: 230,

formulation of the problem is vague, and I have intentionally retained the vagueness, which is essential given that the two standard approaches to solving the problem that Raz enumerates seem to address two apparently very different problems.

Raz has given different names to the two approaches in different places. In one place, he distinguishes between "justificatory" and "social" conceptions of normativity (1974: 134; cf. 1977: 150). In another, he makes what seems the same distinction by referring to them as "validity-based" and "belief-based" approaches to normativity (1975/90: 170). I shall henceforth call the two "justificatory" and "explanatory" approaches to, or conceptions of, the normativity of law.

The justificatory approach attempts to account for the normativity of law by showing that laws are valid reasons for action. According to the explanatory approach, in order to account for the normativity of law, one must show not that laws are valid reasons, but rather explain what it is for them to be treated or upheld as such (Raz 1975/90: 170; 1974: 134). The traditional natural law theories according to which laws necessarily are morally sound are justificatory conceptions of legal normativity (1975/90: 154-170; cf. Finnis 1980: 23-24). According to these theories, it is the moral soundness of legal rules that justifies guiding one's behavior according to them. Hart's project of explaining what it is for there to be a law, and what it is for there to be a legal system, amounts to an explanatory conception of legal normativity.

Kelsen rejected the explanatory approach and opted for the justificatory approach. After favoring Hart's explanatory conception of

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234-235; see also Hart 1966/82). I believe that this is largely a red herring, springing largely from: (i) the unwarranted assumption that the true home of normative language is morality; and (ii) the perennial concern of legal philosophers to spot any noncontingent connection between law and morality. These thoughts are obviously related to some of my discussion in note __ above.

legal normativity in his early writings, Raz has come to share Kelsen's view and seems to have adopted Kelsen's reasons.[19]

It is not easy to determine what Raz sees as Kelsen's reasons for rejecting the explanatory approach. Kelsen does not deny that legal relationships can be characterized using the explanatory approach. But according to him, what can be so characterized are naked power relations existing within a community. What gets left out, according to him, is the fact that legal relations are normative relations, ones imposing obligations and granting rights and powers (in the technical legal sense) (Raz 1974: 136; 1981: 451). Kelsen maintains that no explanation of legal normativity based on the explanatory approach can adequately account for the normative character of laws.

According to Kelsen then, a resort to the justificatory approach is necessary to satisfactorily account for the normative nature of legal relations. In order to adequately show how it is that laws are reasons for action, one must explain why one ought to act according to laws (Raz 1974: 137). In other words, one has to deploy normative, or in Hart's terminology internal, statements to adequately characterize legal relations. This amounts to a rejection of describability. Legal relations are normative relations. According to Kelsen and Raz, it is impossible to use only descriptive or external statements to adequately characterize normative relations. In order to do that, one must resort to normative or

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[19] Raz has had a varied and complex history with the two approaches. In a 1974 commentary article on Kelsen, Raz enumerates Kelsen's reasons for adopting the justificatory approach, and says that Kelsen's legal theory is the best existing theory following the justificatory approach (1974: 145). In the same article, Raz says that Hart's The Concept of Law provides the most successful deployment of the explanatory approach in explaining the normativity of law (134). In his 1975 book, Practical Reason and Norms, Raz says that explanations following the explanatory approach "come nearer the truth" than those following the justificatory approach (1975/90: 170). Between 1975 and 1977, Raz abandoned the explanatory approach and adopted an amended version of Kelsen's account. In a 1977 article, Raz adopts the justificatory approach without explicitly endorsing Kelsen's reasons or giving independent reasons. The 1974 and 1977 articles are reprinted in Raz's 1979 book The Authority of Law as essays 7 and 8, respectively. In the preface to that book, Raz says: "The best positivist explanation of the use of normative language in law was suggested by Kelsen . . ." (vii). I am inferring from this history that Raz largely endorses Kelsen's reasons for favoring the justificatory approach.

internal statements. In other words, in order to adequately characterize legal relations, one cannot merely describe, but must also prescribe.

There is an important connection between Raz's second line of reasoning that I have been rehearsing and the first on detached legal statements. What distinguishes Kelsen from traditional natural law theorists is that he does not think that the internal statements that are to be deployed to characterize legal relations need be the committed sort. Instead, detached legal statements may be used to characterize legal relations. Legal science, as Kelsen conceives it, characterizes legal relations from the point of view of the hypothetical legal man -- i.e. a person accepting all and only laws as providing him with reasons for action (Raz 1974: 141; 1975/90: 171; 1980: 237). In this way, legal science considers laws as fully normative or reason-giving -- according to the justificatory conception of normativity -- but in a special uncommitted sense of "consider" (Raz 1974: 135, 143, 145).

11.

Kelsen's reasons for considering the explanatory approach inadequate is more than a little unclear. Raz quotes two passages from the second edition of Kelsen's The Pure Theory of Law (1960/67).

In one quoted passage, Kelsen maintains that the explanatory approach characterizes a legal relation as a "relation of an object to a wish or will of an individual directed at this object" (Kelsen 1960/67: 19, quoted in Raz 1974: 135). Such a characterization, Kelsen goes on to remark, "describes only the relation between two facts, not the relation between a fact and an objectively valid norm . . ." (Kelsen 1960/67: 19-20, quoted in Raz 1974: 135). Raz goes on to note that construing laws as commands of a sovereign, as Bentham and Austin did, would be to invite the very criticism that Kelsen makes in this passage (1974: 135).

In a second passage that Raz quotes, Kelsen says that it is possible to characterize legal relations using the explanatory approach. But to do so would be to characterize them nonnormatively, as "power relations (i.e. relations between commanding and obeying or disobeying human beings)"

(Kelsen 1960/67: 218, quoted in Raz 1974: 136). Raz says the following immediately after the quoted passage:

> This is a key passage. Kelsen claims in effect that the [explanatory conception of] normativity is not a cocept[ion] of normativity at all. It does not allow the interpretation of law as imposing obligations, granting powers, rights, etc. It makes the law indistinguishable from the commands of a group of gangsters terrorizing the population of a certain area. Only by using the [justificatory conception of] normativity can one understand the true character of legal systems as normative systems. (136)

This may be a correct diagnosis of Kelsen's reasons for rejecting the explanatory conception in favor of the justificatory conception. But it is very odd that Raz does not go on to observe that Hart's particular explanatory approach is not subject to the same worry. Hart too considered inadequate the early legal positivist construal of laws as orders backed by threats of sanctions. Such a legal theory cannot distinguish between law and coercion.

Hart aired many different criticisms of Austin's legal theory in The Concept of Law (1961/94). Of these, the most fundamental was that Austin's conception of laws as orders of superiors backed by threats of sanctions fails to account for the fact that members of a community governed by laws often treat laws as providing reasons for action. This phenomenon that Hart calls the "internal aspect" of laws, or of rules more generally, is what he sought to capture using the notion of norm-acceptance. Persons who accept the norms that amount to laws bear what Hart calls the "internal attitude" towards laws, and treat them as providing themselves and others with reasons for action. Such people see laws as creating relations of obligations, rights, and powers.

In the years subsequent to the initial publication of The Concept of Law (1961/94), Hart confronted the more sophisticated and resourceful command theory of Bentham's.[20] In a 1966 article, Hart says that the most

[20]Hart edited Bentham's An Introduction to the Principles of Morals and Legislation (1789) and Of Laws in General (1945) as parts of The Collected Works of Jeremy Bentham. His editions of both works appeared in 1970. The latter work seems to have had a particularly strong influence on Hart's thinking in the years subsequent to the initial publication of The Concept of Law. Bentham's manuscript of Of Laws in General, the work that

fundamental criticism that one can offer of Bentham's theory is that it lacks conceptual resources to account for a particular feature.

> This feature is what is now called the 'normativity' of [] statements [of legal obligation] and statements of the law or the legal position of individuals under the law. To say that a man has a legal obligation to do a certain act is . . . to assess his acting or not acting in that way from the point of view adopted by at least the Courts of the legal system who accept the law as a standard for the guidance and evaluation, of conduct . . . . (1966/82: 144)

The point he makes here is the same one that motivated Hart's development of an alternative theory in The Concept of Law.

Hart's legal theory based on the notion of norm-acceptance was designed to characterize legal relations as normative relations -- as those of obligations, rights, and powers, rather than as those existing in scenes of coercion -- and to avoid thereby the pitfalls of the early legal positivist command theories. His famous distinction between having an obligation and being obliged, e.g. by a gunman, (1961/94: vi, 82-83) was meant to illustrate the distinction between normative relations and those created by coercion, and to clearly signal his departure from the errors of the earlier legal positivist command theories.

It follows that Kelsen's particular reasons for rejecting explanatory conceptions of legal normativity that Raz summarizes are without force against Hart's explanatory conception. We can rather quickly set aside another possible source of Raz's dissatisfaction with the explanatory

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Bentham intended as a continuation of the Introduction, was buried among Bentham's unpublished papers, and its existence came to light only in 1945. In a 1971 article on this work, Hart says the following:

> Its originality and power certainly makes it the greatest of Bentham's contributions to analytical jurisprudence, and I think it is clear that, had it been published in his lifetime, it rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence, and that analytical jurisprudence, not only in England, would have advanced far more rapidly and branched out in more fertile ways than it has since Bentham's days. (1971/82: 108)

In the articles collected in Essays in Bentham (1982), Hart rethinks almost all of the criticisms that he had earlier aired against Austin's command theory of law, in light of the more sophisticated theory that Bentham had developed.

conception of legal normativity. When he wrote Practical Reason and Norms (1975/90), Raz still considered the explanatory conception superior to the justificatory conception of the normativity of law. Yet, Raz asserts there that the explanatory conception is not free of defects. In particular, he says, it lacks the resources to account for detached legal statements (170-177). My arguments in § __ show that the explanatory approach does not need to suffer from this defect. In formulating (A3), I did not have to resort to any normative statements of a justificatory approach. So, the inability to account for detached internal statements cannot be what motivates abandonment of describability.

Kelsen seems to have been generally skeptical of any nonnormative explanations of normative relations in general, and of legal relations in particular.[21] The impression I get from a number of his writings is that Kelsen takes for granted that explanatory accounts of legal normativity are invariably reductionist accounts that mistakenly seek to characterize normative statements as descriptive statements (see 1934/92: chs. 1, 3; 1945: ch. 12; 1960/67: chs. 1, 3). He seems to have ignored the possibility of explanatory accounts that do not seek to reduce internal legal statements to descriptive statements, but rather deploy descriptive statements only to characterize attributions of internal legal statements.[22]

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[21] This seems to explain a rather amusing aside in Hart's description of his public meeting with Kelsen:

> I should like to record the fact that our discussion had its entertaining moments. . . . The second was towards the end of our debate, when upon Kelsen emphasizing in stentorian tones, so remarkable in an octogenarian (or in any one), that 'Norm was Norm' and not something else, I was so startled that I (literally) fell over backwards in my chair. (1963: 287)

Hart does not explain what comments of his occasioned this emphasis by Kelsen.

[22] In other words, Kelsen seems to have been unmindful of the distinction between straight and oblique analyses of normative statements that I discussed in some earlier notes. Another way of diagnosing Kelsen's mistake is to appeal to Eugenio Bulygin's useful distinction between weak and strong reductionisms. See Bulygin (1981: 432). By "weak reductionism", Bulygin means the thesis that external legal statements are reducible to descriptive statements. By "strong reductionism", he means the thesis that internal legal statements are reducible to descriptive

Hart's expressivist analysis of internal legal statements is one such attempt to characterize internal legal statements by giving a descriptivist analysis of attributions of internal legal statements. It follows that Hart does not make the mistake of trying to reduce normative statements to descriptive statements. In his summary of Kelsen's arguments, Raz does not provide us with a good reason for being skeptical about viability of such nonreductive explanatory projects. Unless Raz has other arguments, his rejection of describability is unwarranted.

12.

Raz is not alone in doubting the describability of legal practices in particular, and of normative practices more generally. Ronald Dworkin clearly rejects describability in his writings, both early and late (see e.g. 1972; 1986; 1996). Lon Fuller and John Finnis seem to disfavor describability although things are far from clear (see Fuller 1956; Finnis 1980: ch. 1). In a few places, Raz has endorsed Finnis's argument in chapter 1 of Natural Law and Natural Rights (1980) (see Raz 1983: 192-193; 1985: 219-221; 1998: 21-22). It may be the case that Raz sees Finnis's argument as supplementing his own (and/or Kelsen's) arguments against describability that I have outlined in the two preceding sections.

I am of the opinion that Finnis's argument ultimately does not bear such an interpretation. Raz cites Finnis's chapter 1 for the claim that the explanation of the nature of law has to be "tied to" (1983: 193), "based on" (1985: 219), or "involves" (1998: 21) evaluative considerations. The conclusion that Finnis specifically argues for is that in order to zero in on the important or central aspects of the legal phenomena, and to select and/or develop concepts for use in adequately describing such aspects, a theorist must participate in the evaluations of the members of the community that he studies (1980: 16).

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statements. Bulygin argues that Hart was only a weak reductionist. What makes Bulygin's discussion very confusing for our purposes is that he says Kelsen too was only a weak reductionist. The point I am trying to make in the above text is that Kelsen (contrary to what Bulygin says) seems to have ignored the possibility of being a weak reductionist without being a strong reductionist.

So far, Hart has no reason to disagree. His emphasis on the need to capture the "internal aspect of rules" essentially makes the same point. Hart too saw a need to capture the legal phenomena as the participants see them. As I indicated in § __ above, his most fundamental criticism of Austin and Bentham had to do with their failures to adequately account for the internal point of view of at least some participants in legal systems. Neil MacCormick once described Hart's approach as "hermeneutic" (1981: 29), and Raz has reported that Hart was not unhappy with this characterization, though he may have found the particular label unattractive (see Raz 1998: 2 n.4).

Hart and Finnis do disagree on the what kind of "participation" a theorist needs to engage in in order to produce an adequate legal theory. Finnis actually lauds Hart for trying to account for the internal point of view (1980: 6-7), but goes on to argue that Hart does not go sufficiently far. Finnis says that ultimately a theorist must concentrate on and try to account for the point of view of those who not only consider laws as "at least presumptive requirements of practical reasonableness", but also <u>are</u> "practically reasonable" (15). In attempting to account for the point of view of those who are practically reasonable, a theorist must obviously begin to make his own judgments of practical reasonableness. In other words, Finnis thinks that a theorist needs to participate to the extent of deploying his own judgments of practical reasonableness.

I am not sure that I understand the considerations that Finnis names in motivating this claim, and what little understanding I have seems to indicate that Hart's position on this issue should be favored over Finnis's. But more importantly, I believe that this issue of kinds or degrees of participation is really orthogonal to the issue of describability. No matter what kind of participation is actually required of a theorist, once he participates sufficiently to zero in on the important aspects of the legal phenomena, and selects and/or develops the concepts necessary to adequately describe those aspects, then he can begin to <u>describe</u>. Finnis does not say that either the concepts that the

theorist selects and/or develops, or the theory that he constructs using those concepts, have to be nondescriptive.

In fact, in a long and helpful endnote, in which he tries distinguish his own position from Dworkin's, Finnis is quite explicit about the descriptive nature of the legal theory that he seeks. He there says:

> The fact that, as I have argued in this chapter, the descriptive theorist needs the assistance of a general normative theory in developing sufficiently differentiated concepts and reasonable standards of relevance does not eliminate the different uses to which the more or less common stock of theoretical concepts will be put by the normative and the descriptive (historical) theorists, respectively. (21 n)

In sum, I do not think that Finnis's argument in the first chapter of his Natural Law and Natural Rights can be used to cast doubt on describability. That, in turn, means that Raz does not have the arguments to motivate his rejection of describability.

13.

Raz has argued that the occupation of the adherent's point of view is not necessary in uttering internal legal statements. And he has also argued that the workings of a normative practice like the legal practice, including its discursive aspect, cannot be characterized properly using only descriptive, nonnormative predicates. I have argued that these arguments are without force, and that they do not either severally or jointly pose a threat to the strategy in analyzing internal legal statements that Hart resorted to.

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